IN THE COURT OF APPEALS OF IOWA

No. 9-663 / 09-0359
Filed September 2, 2009

BANK OF THE WEST, Successor in Interest to COMMERCIAL FEDERAL BANK, F.S.B.,
Plaintiff-Appellee,

vs.

MICHAEL R. MYERS REVOCABLE TRUST, Successor in Interest to Michael R. Myers, Deceased,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom, Judge.

A co-guarantor appeals from a district court ruling granting summary judgment in favor of the bank. **REVERSED AND REMANDED.**

Timothy C. Hogan and Joel D. Huston of Hogan Law Office, Des Moines, for appellant.

Thomas H. Burke and Jonathan Kramer of Whitfield & Eddy, P.L.C., Des Moines, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

DOYLE, J.

The Michael R. Myers Revocable Trust (Myers Trust) appeals from a district court ruling granting summary judgment in favor of Bank of the West in an action on a promissory note the bank alleges was secured by a continuing guaranty executed in 1999 by Michael Myers, who is now deceased. We reverse the judgment of the district court and remand for further proceedings.

I. Background Facts and Proceedings.

The summary judgment record reveals the following undisputed facts: In 1999, Regency Land Company, L.C. (Regency) applied for a five-million-dollar loan from Commercial Federal Bank. In connection with that loan, Regency's president, Michael Myers; his sons, James and Robert; and his partner, Richard Moffitt, each executed documents entitled "Unconditional Open End Guaranty of Payment" on December 17, 1999. Those guaranties provided:

> Each Guarantor hereby jointly and severally, absolutely and unconditionally guarantees to Lender, its successors and assigns, prompt payment as and when due of the Notes, including all principal, interest and additional charges thereunder. The Notes guaranteed hereby include all notes now existing and all Notes hereafter executed by Borrower in favor of Lender, and all modifications and renewals thereof. This Guaranty shall be a continuing guaranty of payment as to all of the Notes and shall continue to be in force and binding upon Guarantor, whether or not some or all of the Notes are paid in full, until this Guaranty is revoked prospectively as to future loans, by written notice actually received by Lender at its address above. Any revocation shall not be effective as to any Notes existing or committed for at the time Lender receives the notice or as to any renewals and modifications thereof. The liability of Guarantor hereunder shall be unlimited, except as limited by the effect of a revocation notice.

On September 14, 2004, Regency executed a new promissory note in the amount of six million dollars payable to Commercial Federal. That note, which

was signed by Michael Myers on behalf of Regency, stated it "evidences the renewal of prior Promissory Note . . . in the original amount of $5,000,000.00." James, Robert, and Moffitt signed new limited guaranties. James and Robert each agreed to guarantee payment of twenty-five percent of the September 14, 2004 promissory note, while Moffitt agreed to guarantee payment of fifty percent of that note. All of the new limited guaranties stated:

> If Lender presently holds one or more guaranties, or hereafter received additional guaranties from Guarantor, Lender's rights under all guaranties shall be cumulative. This Guaranty shall not (unless specifically provided below to the contrary) affect or invalidate any such other guaranties. Guarantor's liability will be Guarantor's aggregate liability under the terms of this Guaranty and any such other unterminated guaranties.

A "Notice of Final Agreement," also executed on September 14, 2004, identified the guarantors as "including without limitation" Moffitt, James, and Robert. Michael did not execute a new guaranty in connection with the September 14, 2004 note.

Regency failed to pay the balance due on the promissory note by its maturity date of October 1, 2006. Several "Change in Terms Agreement[s]" were executed thereafter by Commercial Federal and its successor in interest, Bank of the West, increasing the interest rate and extending the maturity date of the note. Bank of the West eventually filed suit in May 2008 against, among others, James, Robert, Moffitt, and the Myers Trust, as Michael had passed away.[1] The bank alleged those individuals and the trust were liable as guarantors for the

[1] The trust agreement directed the trustee to pay all of Michael's debts after his death. *See, e.g., Brenton Bank & Trust Co. v. Beisner*, 268 N.W.2d 196, 199 (Iowa 1978) ("[D]eath of a contract obligor does not relieve his estate of liability, and this rule applies to guaranties.").

remaining balance due on the September 14, 2004 promissory note. James, Robert, and Moffitt did not file answers to the bank's petition, though the Myers Trust did.

Bank of the West consequently filed a motion for default judgment against James, Robert, and Moffitt, and it sought summary judgment against the Myers Trust. The bank asserted the trust was liable for the entire amount due on the September 14, 2004 promissory note pursuant to the continuing guaranty executed by Michael in 1999. In resistance, the Myers Trust contended the bank, Regency, and the guarantors "expressly agreed that the 1999 Guaranties would be released and replaced by the 2004 Guaranties" and that "Mike Myers would have no personal liability relating to the 2004 loan." The trust supported its resistance with affidavits signed by James Myers and Chris Brown, the director of accounting for Regency, stating the parties had reached such an agreement during their negotiations for the 2004 loan.

Following a hearing, the district court entered default judgments against James, Robert, and Moffitt for the unpaid principal, interest, late charges, and fees due on the September 14, 2004 note, totaling $2,370,712.28. The judgments against those individuals were limited to the percentages set forth in their 2004 guaranties. The court then granted the bank's summary judgment motion against the Myers Trust. It accepted the affidavits submitted by the trust as true for purposes of the motion, but found:

> The arguments of MRM Trust are based in large part on verbal agreements made at the time of the 2004 loan renewal and the understandings of several individuals. However, these verbal agreements or understandings do not change the clear written language of the 1999 guaranty signed by Michael Myers. As set

> forth above, the 1999 guaranty was continuing in nature. It could be revoked as to future loans, but only by a written notice of revocation. No such written revocation was ever delivered to the bank.

The court accordingly concluded judgment should also be entered against the Myers Trust.

After filing a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), which was denied by the district court, the Myers Trust filed this appeal. It claims the court erred in granting Bank of the West's summary judgment motion because a genuine issue of material fact exists as to whether the 1999 guaranty was rescinded by agreement of the parties.

II. Scope and Standards of Review.

We review the district court's summary judgment rulings for the correction of errors at law. Iowa R. App. P. 6.907 (2009); *Faeth v. State Farm Mut. Auto. Ins. Co.*, 707 N.W.2d 328, 331 (Iowa 2005). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Grinnell Mut. Reins. Co. v. Jungling*, 654 N.W.2d 530, 535 (Iowa 2002). A fact question arises if reasonable minds can differ on how the issue should be resolved. *Grinnell Mut. Reins.*, 654 N.W.2d at 535. No fact question arises if the only conflict concerns legal consequences flowing from undisputed facts. *Id*.

III. Discussion.

The Myers Trust claims the district court erred in entering summary judgment in favor of Bank of the West and finding the undisputed facts

established the September 14, 2004 promissory note was secured by the guaranty agreement Michael signed in 1999. We agree.

A guaranty is a contract by one person to another for the fulfillment of a promise of a third person. *City of Davenport v. Shewry Corp.*, 674 N.W.2d 79, 86 (Iowa 2004). The extent of a guarantor's obligation must be determined from the parties' written contract. *See Bankers Trust Co. v. Woltz,* 326 N.W.2d 274, 276 (Iowa 1982). Accordingly, the rules concerning the interpretation and construction of contracts are applicable to guaranties. *Andrew v. Austin,* 213 Iowa 963, 967, 232 N.W. 79, 81 (1930) ("The same rule is to be applied in the construction of contracts of guaranty as other contracts.").

We therefore construe guaranty contracts according to the intention of the parties as ascertained by the language used in the contract and the circumstances of the guaranty. *Williams v. Clark*, 417 N.W.2d 247, 251 (Iowa Ct. App. 1987). Extrinsic evidence may be considered only to show what the parties meant by the language of the guaranty. *Wellman Sav. Bank v. Adams*, 454 N.W.2d 852, 856 (Iowa 1990). Extrinsic evidence is not admissible to show what the parties meant to say, or to vary the terms of the guaranty. *Bankers Trust Co.*, 326 N.W.2d at 276.

The parties agree the 1999 guaranty executed by Michael is a "continuing guaranty." *See Maresh Sheet Metal Works v. N.R.G., Ltd.*, 304 N.W.2d 436, 440 (Iowa 1981) (stating there are two types of guaranties—restrictive and continuing). Such a guaranty "'contemplates a future course of dealing during an indefinite period, or it is intended to cover a series of transactions or a succession of credits.'" *Bankers Trust Co.*, 326 N.W.2d at 277 (citation omitted).

An offer for a continuing guaranty ordinarily "remains effective until revoked by the guarantor, or some rule of law, except as to any past transactions, which have served to create a contractual relationship between guarantor and guarantee." *Union Trust & Sav. Bank v. State Bank*, 188 N.W.2d 300, 302 (Iowa 1971); *see also Brenton Bank & Trust Co.*, 268 N.W.2d at 199 (explaining "a revocation of the guaranty would not terminate liability as to the original indebtedness and renewals and extensions thereof but would operate only as to new indebtedness of [debtor] after the revocation").

"While the method of exercising the power of revocation varies, a continuing guaranty may be terminated only on compliance with its terms." 38A C.J.S. *Guaranty* § 40, at 579 (1996) (footnotes omitted). As the district court recognized, the continuing guaranty in this case required the guarantor to provide the lender with written notice of revocation. No such written revocation of the 1999 guaranty by Michael appears in the summary judgment record before us. Unlike the district court, however, we do not believe that ends our inquiry, as the above-cited treatise on guaranty agreements goes on to state:

> In addition, a contract of guaranty may expressly require written revocation, although, even where the contract of guaranty provides that it cannot be canceled except after notice in writing, a verbal revocation of it, if accepted and acted on, will relieve the guarantor.

Id. at 580; *see also Whalen v. Connelly*, 545 N.W.2d 284, 291 (Iowa 1996) ("[A] provision in a written contract that it can be modified or rescinded *only* in writing is ineffective . . . ."). This rule is in keeping with the well-settled principle that "where either party has orally agreed to abandon or rescind . . . a contract, and this is acquiesced in, he may not thereafter maintain an action for its

enforcement." *Henderson v. Beatty*, 124 Iowa 163, 169, 99 N.W. 716, 718 (1904); *see also O'Dell v. O'Dell*, 238 Iowa 434, 455, 26 N.W.2d 401, 412 (1947) ("Any executory contract, when the rights of others are not involved, may be rescinded altogether . . . by the mutual consent of the parties.").[2]

The Myers Trust argues there is a genuine issue of material fact as to whether the parties in this case agreed to rescind the 1999 guaranty executed by Michael during their negotiations for the 2004 loan. We agree.

In support of its argument, the trust relies, in part, on the affidavits of James Myers and Chris Brown, which it submitted in resistance to the bank's summary judgment motion. Those affidavits state the bank, Regency, and the guarantors agreed "that the 1999 guaranties would be released and replaced by the 2004 guaranties" and "that Mike Myers would have no personal guaranty relating to the 2004 loan." The trust notes the limited guaranties executed by James, Robert, and Moffitt in 2004 further support its argument. Under the 1999

[2] We do not agree with Bank of the West that *O'Dell* was "largely overruled" by our supreme court's opinion in *Recker v. Gustafson*, 279 N.W.2d 744, 759 (Iowa 1979). Although the court in that case did state certain language in *O'Dell* was "no longer controlling," it was referring to statements in *O'Dell* that could be construed as incorrectly holding that new consideration is not necessary to support a contract modification. *Recker*, 279 N.W.2d at 759. The court's statements in *O'Dell* regarding rescission of contracts were not disavowed by *Recker* and remain good law. *See, e.g.*, *Iowa Chem. Corp. v. W.R. Grace & Co.*, 715 F.2d 393, 396 (8th Cir. 1983) (citing *O'Dell* with approval in discussing rescission). Bank of the West also argues *O'Dell* is inapplicable because "the ability to freely modify or terminate a contract without consideration only applies if the contract remains executory." It asserts the 1999 continuing guaranty executed by Michael was not executory as the bank "had fully performed thereunder." *See Economy Roofing & Insulating Co. v. Zumaris*, 538 N.W.2d 641, 650 (Iowa 1995) ("An executory contract is defined as '[a] contract that has not as yet been fully completed or performed.'" (quoting Black's Law Dictionary 570 (6th ed. 1990)). We do not agree because a continuing guaranty appears to be executory by its very nature given that such a guaranty "contemplates a future course of dealing during an indefinite period." *Bankers Trust Co.*, 326 N.W.2d at 277; *see also Economy Roofing & Insulating Co.*, 538 N.W.2d at 650 (indicating the "phrase executory contract is misleading" because "all contracts, by definition, are executory").

guaranties, the guarantors were jointly and severally liable for the full amount of Regency's indebtedness to the bank. But, under the 2004 guaranties, the liability of James, Robert, and Moffitt was limited "based on their respective interests in Regency." The trust thus asserts "the lender's position that the 1999 Guaranties . . . continue to secure the Promissory Note renders the 2004 Guaranties superfluous and of no effect."

"An absolute and continuing guaranty may be terminated by the acceptance of a new guaranty as a replacement for the prior one." 38A C.J.S. *Guaranty* § 39, at 578; *see also O'Dell*, 238 Iowa at 457, 26 N.W.2d at 413 ("A contract may be rescinded by a subsequently executed instrument or agreement inconsistent with the first."). Whether a contract has been rescinded by mutual consent "is a question of fact which need not be proven by express terms, but may be inferred from the attendant circumstances and the conduct of the parties." *O'Dell*, 238 Iowa at 459, 26 N.W.2d at 414.

Viewing the facts in the light most favorable to the Myers Trust, *see Howell v. Merritt Co.*, 585 N.W.2d 278, 280 (Iowa 1998), we determine reasonable minds could differ as to whether the parties agreed to rescind Michael's continuing guaranty when the 2004 guaranties were executed. Although Bank of the West argues that the trust should not be allowed to avoid summary judgment by simply submitting affidavits stating the guaranty being sued on was rescinded,[3] we believe such a question is one of credibility, which is

[3] The bank posits that to allow such a result would be akin to the following scenario:

> [I]f a hypothetical Seller and a hypothetical Buyer had a written contract, signed by both, for the sale of a widget for $5.00, B could avoid summary judgment by signing an affidavit saying that the "real" price was $1.00.

"peculiarly the responsibility of the fact finder to assess," not the district court on summary judgment. *Smidt v. Porter*, 695 N.W.2d 9, 22 (Iowa 2005) (noting absence of Iowa authority on "sham affidavits").

In addition, we note the bank does not contend the affiants lacked personal knowledge or that they were not competent to testify to the matters stated in the affidavits. *See* Iowa R. Civ. P. 1.981(5) ("Supporting and opposing affidavits shall be made on personal knowledge . . . and shall show affirmatively that the affiant is competent to testify to the matters stated therein."). Nor does it contend the affidavits are improperly based on conjecture or speculation. *Cf. Wemett v. Schueller*, 545 N.W.2d 1, 3 (Iowa Ct. App. 1995) (determining affidavit based on mere speculation was insufficient to avoid summary judgment). We conclude the affidavits set forth specific facts based on the affiants' personal knowledge of the transactions at issue showing there is a genuine issue for trial, as required to defeat a motion for summary judgment. *See* Iowa R. Civ. P. 1.981(5).

In so concluding, we recognize there is language in the September 14, 2004 promissory note and guaranties that conflicts with the trust's assertion that Michael's 1999 guaranty was rescinded by mutual agreement of the parties. Specifically, as we previously noted, the 2004 guaranties provide: "This Guaranty shall not (unless specifically provided below to the contrary) affect or invalidate any such other guaranties" presently held by the lender. The guaranties further provide:

> This Guaranty, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Guaranty. No alteration of or amendment to

> this Guaranty shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alternation or amendment.

Although Bank of the West argued in the district court proceedings that the parol evidence rule barred evidence of the parties' alleged oral agreement to rescind the 1999 guaranties in connection with the 2004 loan, *see Garland v. Branstad*, 648 N.W.2d 65, 69 (Iowa 2002) (stating the parol evidence rule forbids the use of extrinsic evidence to vary, add to, or subtract from a written agreement), it does not advance a similar argument on appeal. In fact, its brief on appeal states, "The district court did not find that MRM Trust was unable to present evidence of extrinsic discussions in 2004 because such discussions would vary the language of the MRM Guaranty as suggested by MRM Trust." We therefore need not and do not consider the effect, if any, of the parol evidence rule in this case. *See Garland*, 648 N.W.2d at 69 (noting the rule "applies only to negotiations or agreements that are prior to or contemporaneous with the writing" and does not bar parol evidence of an independent oral contract).

IV. Conclusion.

Upon viewing the facts in the light most favorable to the Myers Trust, we conclude reasonable minds could differ as to whether the parties agreed to rescind the continuing guaranty executed by Michael Myers. The district court's grant of summary judgment in favor of Bank of the West was thus in error. We accordingly reverse the judgment of the district court and remand for further proceedings.

REVERSED AND REMANDED.